# An unlikely couple

## Informed consumer choice in EU law and the Middle East conflict

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We are currently witnessing a general trend towards more ethical consumption, more sustainable food production, and more awareness about the origins of products. However, it seems a far stretch to link this societal trend (in Europe) to one of the most complex territorial conflicts today, namely about the status of the Palestinian Territories, i.e. the West Bank and East Jerusalem ('Territories'). Not for the ECJ.

In *Organisation juive européenne and Vignoble Psagot* from 12th November 2019, the Grand Chamber of the ECJ held that under EU consumer protection rules the labelling of the territorial origin on foodstuff must distinguish not only between the State of Israel and the Territories, but also between the Territories and Israeli settlements in these Territories.

The combination of those two topics makes a quite unusual case – yet a case which is remarkable not only in its reasoning, but which may contribute to raising the importance of compliance with international law for individual consumer choices.

**Food labelling as the normative trigger**

Foodstuff labelling forms part of EU consumer law. Specifically, Arts. 9 (1) (i) and 26 (2) (a) Regulation No. 1169/2011 provide that the indication of the country of origin or the place of provenance of foodstuff is mandatory, where failure to indicate might mislead the consumer as to its true country of origin or place of provenance. In short, consumers need to know whence the foodstuff they consume originates.

The present case is based on a preliminary reference from the French Conseil d'État. The French Minister for the Economy and Finance had issued a notice to economic operators. The notice obliges economic operators to take into account the specific situation in Israel and the Territories when labelling products stemming from that (in want of a better term) area. In particular – drawing on the EU Commission's Interpretative Notice on indication of origin of goods from the Territories occupied by Israel since June 1967 (OJ 2015 C 375, p. 4) – the products from that area have to reflect their territorial status under international law. As a consequence, origin labelling has to distinguish between (i) the State of Israel, (ii) the Territories and (iii) Israeli settlements in the Territories. The applicants in the French case argued that such distinction would be incompatible with Regulation 1169/2011. As a consequence, the referring court asked the ECJ, in essence, whether Arts. 9 (1) (i) and 26 (2) (a) Regulation 1169/2011, i.e. the need to avoid misleading consumers, mandate such a categorization.

**The ECJ judgment…**

The ECJ upheld the labelling obligation prescribed by the French notice.

First of all, the ECJ argued that products from the *State of Israel* need to be distinguishable from products from the *Territories*. For, according to the ECJ, under international law the status of the Territories is distinct from that of the State of Israel (para. 34). In detail, Art. 60 Union Customs Code, to which Recital 33 of Regulation 1169/2011 refers, distinguishes between 'country' that is understood as synonym for 'state', and 'territory'. Without many explanations, the ECJ seems to conclude that the Territories cannot be considered a state. Instead, the Court qualifies them as 'territory' – drawing on its case-law on the Western Sahara region (paras. 27-35) – which it defined to include "geographic spaces which, whilst being under the jurisdiction or the international responsibility of a State, nevertheless have a separate and distinct status from that State under international law" (para. 31). Hence, distinct labels are required. It is unlikely, however, that these Custom Code specific considerations imply that EU law prevents the EU from recognizing Palestine as a state (which it has not done yet). The important aspect for the ECJ was that a single product label for Israel and the Territories potentially confuses consumers.

So far so good. But what about products from *Israeli settlements* in the Territories? Does one need to explicitly flag this specific origin? Yes, in the eyes of the ECJ. Despite the fragmented nature of the individual settlements, the Court held that Israeli settlements constitute a 'place of provenance' under Art. 26 Regulation1169/2011. Consequently, products from the Israeli settlements need their own food-label (paras. 44, 45). To sum up, in the Court's interpretation of Art. 60 Union Customs Code and Arts. 9, 26 Regulation 1169/2011, the State of Israel is a 'state/country of origin', the Territories are a 'territory (of origin)' and Israeli settlements are a 'place of provenance'.

On that basis, in a rather bold interpretation of the general objective of Regulation 1169/2011 to enable informed consumer choice regarding ethical considerations, the ECJ mandated the mentioning of *both*, the Territories as well as the Israeli settlements, although Art. 26 (2) Regulation 1169/2011 explicitly requires only one or the other alternatively ('Indication of the country of origin *or* place of provenance shall be mandatory'): The ECJ considered the settlements to be "in violation of the rules of general international humanitarian law, as codified in the sixth paragraph of Article 49 of the Convention relative to the Protection of Civilian Persons in Time of War, signed in Geneva on 12 August 1949" (para 48). Because of these violations of "fundamental rules of international law", non-labelling would be liable to mislead consumers regarding the classification of geographic origin (para. 56-57).

**…meets international law**

While the case raises various interesting legal questions internal to EU law (e.g. the appropriateness of information as regulatory technique for consumer protection or the legal relevance of the Commission Notice), I shall focus on the relevant aspects for international lawyers.

Plainly, the most fascinating aspect of the judgment is how EU law interacts with international humanitarian law. Who would have thought that food labelling in EU

consumer law is related to the Middle East conflict? Surely, the drafters of Arts. 9 and 26 Regulation 1169/2011 were more concerned about consumers' preferences with regard to health, quality and sustainability of food products (confirmed by Recitals 30 et seqq. of Regulation 1169/2011) than with the producers' compliance with international humanitarian law. However, the Regulation's labelling requirement with regard to geographical origin applies to the entire globe, hence also to products originating from disputed territories. In a sense, the whole point of the labelling requirement is to take into account today's global food production chains.

Since assessing questions of international law in the Middle East is, to put it lightly, not the core business of the ECJ, it is most welcome and yet unusual that the ECJ cites the International Court of Justice (three times) and the Security Council to underline its conclusion. Whereas the ECJ gives the impression of assessing the relevant questions of international law itself, it seems – in substance – to defer to the reasoning of those international authorities. The only other court regularly cited in Luxembourg is the European Court of Human Rights (see lately). It remains to be seen whether the engagement with international authorities reflects a tendency away from rather isolationist insistence on the autonomy of EU law, towards more engagement and communication with other international fora.

The judgment illustrates that discussing the relationship between international and EU law is not restricted to seminal constitutional cases (think only of Kadi and Al Barakaat International Foundation), but plays a role in everyday cases such as food labelling or the regulation of aviation services (see Air Transport Association of America). What these cases have in common is that they touch on fundamental legal principles of international law, such as territorial integrity, which not only informs EU secondary law, but is protected by the Treaties themselves (at least in relation to the Member States, see Art. 4(2) TEU).

But why did the ECJ even have to position itself unequivocally in the debate surrounding the status of the individual geographical areas under international law? Because the Court deemed this question important for the food choice of European consumers. In other words, the territorial status in the Middle East is clearly confusing (read Sec. II of AG Hogan's opinion), but the Court had to explain why this matters for the European consumer.

The core argument of the Court is the following: consumers should not be misled into buying products from areas which are inhabited under violation of 'fundamental principles of international law' (paras. 54-56). That, however, would be the case if no distinction was drawn between the Territories and the Israeli settlements. The latter, so the ECJ drawing upon the ICJ, violate international humanitarian law (para. 48). In the eyes of the Court (and AG Hogan's opinion at para. 51), consumers may have ethical reasons related to compliance with international law when making food choice decisions. The Court does not back up this assumption with empirical evidence, but such reasoning reflects the underlying paradigm of an interested, circumspect and alert consumer, who processes all the information available (more on that Weatherill, EU Consumer Law and Policy, 2nd ed 2013, ch. 4). In a nutshell, the Court's decision – while containing a *legal* judgment about the illegality of the

settlements – does not contain an *ethical* judgment itself. Instead, it intends the consumer to be in a position to make that ethical judgment. In normative terms, the ethical concerns of consumers in Art. 3(1) Regulation 1169/2011 are linked to the importance of observing international law as a matter of EU law in Art. 3(5) TEU.

As a result, the regulatory technique of ensuring informed consumer choice combined with the global reach of the Regulation's requirement to provide information on the geographical origin of foodstuff led to this rather unusual holding: in the ECJ's view, European consumers should have the necessary information to base their food choice also on violations of fundamental rules of international law. From a legal point of view (I leave the assessment of the political consequences of the verdict to others), the ECJ enables, perhaps even encourages European consumers to take into account international law violations when making consumption decisions. The onus is now back on the consumer.

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